APPENDIX C – ORDINANCE ADOPTION

C-1	"Ordinance Enactment", Maine Townsman legal note (April 1989) and 30-A
	M.R.S.A. § 3002

- C-2 Notice Requirements for Zoning Ordinances (30-A M.R.S.A. § 4352)
 Title 30-A § 4352 Zoning Ordinances
 Notice of Requirements for Public Proceedings, <u>Maine Townsman</u>
 Amendment of Zoning Ordinance Notice Requirements, <u>Maine Townsman</u>
- C-3 Sample Ordinance to Amend an Ordinance
- C-4 Ordinance Certification Form
- C-5 Adoption of Code by Reference (30-A M.R.S.A. § 3003) and Sample Ordinance
- C-6 "Municipalities May Give Ordinance a Retroactive Effect, Maine Townsman (1998)
- C-7 "The 2003 Ordinance Deadline" What does it man and how does it affect you? State Planning Office, 2001

ORDINANCE ENACTMENT

Please Note: Despite this article's original publication date, it remains a valid resource on the relevant subject matter. Recent cases and statutory changes are footnoted to reflect current law. (9/98)

Question: What is the correct procedure for out town to follow in enacting an ordinance? We do not have a charter specifying how this is to be done.

Answer: Although special enactment procedures may be required for particular kinds of ordinances, for any other kind of ordinance to be enacted 30-A MRSA § 3002 (formerly 30 MRSA § 2153) specifies the steps that must be followed. Most ordinances will be subject to that statute for enactment procedure. For such ordinances to be lawfully enacted 3002 requires that:

- 1) **Posted.** The proposed ordinance must be attested and posted in the manner provided for town meetings.
- **2) Certification.** Once copy of the proposed ordinance must be certified by the municipal officers to the municipal clerk at least 7 days prior to the day of election to be preserved as a public record and copies must be made available for distribution to the voters by the municipal clerk at and after certification as well as at the time of the town meeting.
- **3) Question.** The subject matter of the proposed ordinance must be reduced to the question "Shall an ordinance entitled _______ be enacted?" and that question must be submitted to the town meeting for action either as an article in the warrant or a question on a secret ballot.
- **4) Application.** The section shall not apply to ordinances which are enacted by the municipal officers, such as traffic, general assistance or cable T.V. ordinances.

Under this procedure, the order of events would be as follows:

Certification.

After the ordinance is drafted in its final form, the municipal officers must certify a copy of the proposed ordinance to the municipal clerk to be preserved in the town records as a public record. The certification must be made before the warrant is posted.

Attestation.

From the certified copy, the municipal clerk is then able to make attested copies that will be posted along with the town meeting warrant. The clerk, in attesting copies of the ordinance for posting, should be substantially the following language:

Attest: A true copy of an ordinance entitled "The Subdivision Review Ordinance of the Town of Blankton", as certified to me by the municipal officers of Blankton on the ____ day of March 1989.

Si	gnature	

Town Clerk of Blankton

Distribution.

From the certified copy, the clerk is also able to generate copies of the proposed ordinance for distribution to the general public. The law requires that copies be left in the clerk's office for distribution to the voters and that copies be present at the town meeting for voter use. All of the copies of ordinances referred to here, including the certified and attested copies, may be reproduced by any standard process that the town officials decide to use. In many instances, this is accomplished by offset printing, mimeographing, photocopying, or similar means.

Posting.

The town meeting warrant should be issued with the usual necessary articles. The article relating to the ordinances should be placed in the warrant, as is any other article. This is required whether the vote will be by referendum ballot or at open town meeting. The article should be phrased in the nature of a question with the precise wording called for in Subsection 3. For example: "Article 32. Shall an ordinance entitled 'The Subdivision review Ordinance of the Town Blankton' be enacted?"

The law requires this specific wording and so towns may not use the historic working "To see if the town will vote....", or any other words of that nature. Again, the exact title of the ordinance must be used, not some descriptive phrase. Therefore, it is important for Selectmen to ensure, before certifying a draft ordinance to the Clerk, that it has a title or name.

In addition to the posting procedure required of all town meeting warrants, this statute requires that a copy of the complete text of the proposed ordinance, as attested, be posted right along with, next to, and at the same time as the warrant for the town meeting at which the proposed ordinance will be considered. |If, however, the proposed ordinance or comprehensive plan exceeds ten pages in length, the warrant and warrant article relating to adoption of the item need only state that copies of the text of the same are available from the town clerk. P.L. 1993, c.374, \$1| While the attestation is done by the municipal clerk, the posting is accomplished by the person posting the warrant and ordinance. The return of the person who posts the warrant should contain at the end and before his or her signature words substantially as follows: "And I have this day posed one copy of an ordinance entitled 'The Subdivision Review Ordinance of the Town of Blankton', attested by the municipal clerk, with the warrant(s) at said places."

The same time limits on posting apply to this procedure that apply to the town meeting.

A permissible alternative is for the ordinance itself to be incorporated into the warrant article and printed and attested as part of the warrant. Some communities prefer this approach, particularly where the text of the ordinance is short.

Secret Ballot.

The question may be submitted to the voters on a secret ballot in those towns that use this procedure. If this is desired, it must be done under the provisions of 30-A MRSA § 2528 (formerly 30-A MRSA § 2061). The question may be initiated by a petition to the municipal officers signed by a number of voters equal to at least ten percent of the number of votes cast in town at the last gubernatorial election or by an order of the municipal officers without a petition. The petition or order must be filed with the town clerk on or before the 35th |Now the 45th day, see 30-A MRSA § 2528| day prior to the referendum election. A hearing must be held by the municipal officers on the proposed article and ordinance at least 10 days before the day of voting and at least seven days' notice must be given of the time and place of the hearing and the test of the proposed article. The return of the person posting the notice should be similar to the type of return used in connection with posting a warrant.

Public Hearing.

If an ordinance is not going to be voted on by a preprinted secret ballot under 30-A MRSA § 2528, then there generally is no statutory requirement that a separate public hearing be held prior to a vote on the ordinance at open town meeting. This is because the open town meeting discussion serves as a hearing. However, at least one prior public hearing is advisable to pinpoint problem areas, since no charges in the proposed ordinance can be made from the floor at the open town meeting (see below).

Where an ordinance is one which will be voted on under 30-A MRSA § 2528 (secret ballot process), if the comments made at the public hearing result in substantive revisions to the proposed ordinance, another public hearing on the new draft of the ordinance must be held prior to the secret ballot vote in order to be in strict compliance with Section 2528. *Town of Hampton v. Brust*, 446 A.2d 458 (N.H., 1982). The hearing on the revised ordinance must be scheduled to meet the deadlines set out in the statue. Therefore, when dealing with a complicated ordinance or an ordinance of major importance, Selectmen would be well advised to hold an initial hearing well in advance (e.g., 60 days) of Town Meeting.

Regarding zoning and shoreland zoning ordinances, there is a requirement in 30-A MRSA § 4503 |30-A MRSA § 4503 repealed and replaced by 30-A MRSA § 4352| that the public be given an opportunity to have input in the preparation of the ordinance or any amendments. This "opportunity" usually takes the form a public hearing conducted by the planning board. Section 4503 |30-A MRSA § 4503 repealed and replaced by 30-A MRSA § 4352| should be followed by communities which are not yet subject to the provisions of the new growth management law found, as of this writing, in 30 MRSA § 4960-C |30 MRSA § 4960C repealed and replaced by 30-A MRSA § 4301 et seq.|.

Town Meeting.

Finally, it is the opinion of the MMA Legal Services Staff that an ordinance may not be amended on the floor of town meeting. This opinion is based in part on a reading of the statutes and in part on relevant case law.

The statutory requirement for providing prior notice to the voters of the town in the town warrant is governed by 30-A MRSA § 2523 (2) which states:

"It (the town meeting warrant) shall state in distinct articles the business to acted upon at the meeting. No other business may be acted upon."

The underlying reason for the requirement is that the voters are not to be notified, with reasonable certainty, of the subject matter to be acted upon. Once the voters are so apprised of the nature of the business to be considered, the body may generally act with some latitude in disposing of that business. *Belfast & MLR Co. v. In habitants of Brooks*, 60 Me. 568(1872), *Inhabitants of Argyle v. Eastern Trust & Banking Co.* 125 Me. 370 (1926), *Bucksport v. Bangor RR*, 68 Me. 81 (1878).

It is, however, quite clear from the statute that no other business or subject matter may be acted upon except as stated in the article, and the precision with which an article is stated may limit the latitude which the voters may exercise. *Austin & Blaisdell v. Inhabitants of York*, 57 Me. 304 (1869).

In the *Austin* case, the court determined that a town was severely limited in its ability to deal with a money article specifying a particular sum because the warrant article called "for (the town's) action, yea or nay, upon a single distinct proposition", as opposed to an article which is general in description. Similarly, when a town acts to adopt an ordinance, it is not presented with an article general in its description. The statutory question to be posed to the voters is "Shall an ordinance entitled ______ be enacted?" Such a "single, distinct proposition" demands a "yes " or "no" answer.

Ordinance Enactment Procedures

As a general rule, whether a municipality operates under the charter or only under the State statues, its legislative body must adopt in ordinance form any requirement which the municipality wants to enforce against the general public. The basic procedure for adopting an ordinance at open town meeting is found in Title 30-A § 3002 below. See Chapter 4 of this manual for further information.

Title 30-A § 3002. Enactment procedure

Unless otherwise provided by charter or law, a municipality must enact ordinances by the following procedure.

- **1. Posted.** The proposed ordinance must be attested and posted in the manner provided for town meetings. If a proposed ordinance or comprehensive plan exceeds 10 pages in length, it is sufficient to satisfy this posting requirement that the warrant and the warrant related to the adoption of the ordinance or plan includes a statement that copies of the text of the ordinance or plan and map, if any, are available from the town clerk.
- **2. Certification.** The municipal officers shall certify one copy of the proposed ordinance to the municipal clerk at least 7 days before the day of meeting. The clerk shall keep that copy as a public record and shall make copies available for distribution to the voters from the time of certification. Copies shall be made available at the town meeting.
- A. No ordinance of any municipality subject to this subsection may be held invalid due to the municipality's failure to comply with this subsection unless the plaintiff is prejudiced or harmed by that failure.
- **3. Question.** The subject matter of the proposed ordinance shall be reduced to the question: "Shall an ordinance entitled' be enacted?" and shall be submitted to the town meeting for action either as an article in the warrant or a question on a secret ballot.
- **4. Application.** Subsections 1, 2 and 3 do not apply to ordinances which may be enacted by the municipal officers.

Title 30-A § 3005. Ordinances available

Every ordinance of a municipality shall be on file with the municipal clerk and shall be accessible to any member of the public. Copies shall be made available to any member of the public, at reasonable cost, at the expense of the person making the request. Notice that the ordinances are available shall be posted.

Title 30-A § 3006. Proof of ordinances

The submission to any court or administrative tribunal of a municipal ordinance, bylaw, order or resolve of the legislative body or municipal officers of a municipality, when the ordinance, bylaw, order or resolve has been certified over the signature of the municipal clerk, is prima facie proof of the validity of that ordinance, bylaw, order or resolve.

ZONING ORDINANCES

Special rules governing public hearing requirements for adoption or amendment of zoning ordinances and maps are found in 30-A M.R.S.A. § 4352 below. For more information see Chapter 4 of this manual.

Title 30-A § 4352. Zoning ordinances

A municipal zoning ordinance may provide for any form of zoning consistent with this chapter, subject to the following provisions.

- **1. Public participation required.** The public shall be given an adequate opportunity to be heard in the preparation of a zoning ordinance.
- **2. Relation to comprehensive plan.** A zoning ordinance must be pursuant to and consistent with a comprehensive plan adopted by the municipal legislative body.
- **3. Zoning map required.** A zoning map describing each zone established or modified must be adopted as part of the zoning ordinance or incorporated in the ordinance. Any conflict between the zoning map and a description by metes and bounds shall be resolved in favor of the description by metes and bounds.
- **4. Exemption for public service corporations.** Real estate used or to be used by a public service corporation is wholly or partially exempt from an ordinance only when on petition, notice and public hearing the Public Utilities Commission determines that the exemption is reasonably necessary for public welfare and convenience.
- **5. Effect on local governments.** County and municipal governments and districts are subject to any zoning ordinance.
- **6. Effect on State.** A zoning ordinance that is not consistent with a comprehensive plan that is consistent with the provisions of section 4326 is advisory with respect to the State. Except as provided in this section, a state agency shall comply with a zoning ordinance consistent with a comprehensive plan that is consistent with the provisions of section 4326 in seeking to develop any building, parking facility or other publicly owned structure. The Governor or the Governor's designee may, after public notice and opportunity for public comment, including written notice to the municipal officers, waive any use restrictions in those ordinances upon finding that:
 - A. The proposed use is not allowed anywhere in the municipality;
 - B. There are no reasonable alternative sites for or configurations of the project within the municipality that would achieve the necessary public purposes;
 - C. There are no reasonable alternatives to the project, including sites in other municipalities, that would achieve the necessary public purposes;
 - D. The project will result in public benefits beyond the limits of the municipality, including without limitation, access to public waters or publicly owned lands; and
 - E. The project is necessary to protect the public health, welfare or environment.

A decision to waive a restriction under this section may be appealed by the municipality or any aggrieved party to Superior Court.

- **7. Petition for rezoning; bond.** Any zoning ordinance may provide that if a person petitions for rezoning of an area for the purpose of development in accordance with an architect's plan the area may not be rezoned unless the petitioner posts a performance bond equal to at least 25% of the estimated cost of the development. The bond shall become payable to the municipality if the petitioner fails to begin construction in a substantial manner and in accordance with the plan within one year of the effective date of the rezoning.
- **8. Conditional and contract rezoning.** A zoning ordinance may include provisions for conditional or contract zoning. All rezoning under this subsection must:

- A. Be consistent with the local growth management program adopted under this chapter;
- B. Establish rezoned areas that are consistent with the existing and permitted uses within the original zones; and
- C. Only include conditions and restrictions that relate to the physical development or operation of the property.

The municipal reviewing authority shall conduct a public hearing before any property is rezoned under this subsection. Notice of this hearing must be posted in the municipal office at least 13 days before the public hearing. Notice must also be published at least 2 times in a newspaper having general circulation in the municipality. The date of the first publication must be at least 7 days before the hearing. Notice must also be sent to the owner or owners of the property to be rezoned and to the owners of all property abutting the property to be rezoned at the owners' last known addresses. Notice also must be sent to a public drinking water supplier if the area to be rezoned is within its source water protection area. This notice must contain a copy of the proposed conditions and restrictions with a map indicating the property to be rezoned.

- **9. Notice; general requirements.** Before adopting a new zoning ordinance or map or amending an existing zoning ordinance or map, including ordinances or amendments adopted under the laws governing growth management contained in chapter 187, subchapter II or the laws governing shoreland zoning contained in Title 38, chapter 3, subchapter I, article 2-B, the municipal reviewing authority must post and publish notice of the public hearing required under subsection 1 in accordance with the following provisions.
 - A. The notice must be posted in the municipal office at least 13 days before the public hearing.
 - B. The notice must be published at least 2 times in a newspaper that complies with Title 1, section 601 and that has a general circulation in the municipality. The date of the first publication must be at least 12 days before the hearing and the date of the 2nd publication must be at least 7 days before the hearing. That notice must be written in plain English, understandable by the average citizen.

- E. Notice must be sent by regular mail to a public drinking water supplier if the area to be rezoned contains its source water protection area.
- 10. Additional notice; limited areas. Notice must be given in accordance with this subsection and subsection 9 when a municipality has proposed an amendment to an existing zoning ordinance or map that, within a geographically specific portion of the municipality, has the effect of either prohibiting all industrial, commercial or retail uses where any of these uses is permitted or permitting any industrial, commercial or retail uses where any of these uses is prohibited.
 - A. The notice must contain a copy of a map indicating the portion of the municipality affected by the proposed amendment.
 - B. For each parcel within the municipality that is in or abutting the portion of the municipality affected by the proposed amendment, the notice must be mailed by first class mail at least 13 days before the public hearing to the last known address of the person to whom property tax on each parcel is assessed. Notice also must be sent to a public drinking water supplier if the area to be rezoned is within its source water protection area. The municipal officers shall prepare and file with the municipal clerk a written certificate indicating those persons to whom the notice was mailed and at what addresses, when it was mailed, by whom it was mailed and from what location it was mailed. This certificate constitutes prima facie evidence that notice was sent to those persons named in the certificate. Notice is not required under this paragraph for any type of zoning ordinance adopted under the laws governing growth management contained in chapter 187, subchapter II or the laws governing shoreland zoning contained in Title 38, chapter 3, subchapter I, article 2-B.

Any action challenging the validity of an amendment to a zoning ordinance or map based on a municipality's failure to comply with paragraph B must be brought in Superior Court within 30 days after the adoption of the amended ordinance or map. The Superior Court may invalidate an amended ordinance or map if the appellant demonstrates that the appellant was entitled to receive a notice under paragraph B, that the municipality failed to send the notice as required, that the appellant had no knowledge of the proposed amendment to the ordinance or map and that the appellant was materially prejudiced by that lack of knowledge. Nothing in this subsection alters the right of a person to challenge the validity of any ordinance based on the failure of the municipality to provide notice as required in paragraph A and subsection 9.

NEWSPAPER NOTICE

As was discussed in a February 1997 Legal Note, there are a number of Maine statutes which require that notice of a public hearing on a particular license or application or on an ordinance amendment be given by publication in a newspaper of general circulation. The Municipal Subdivision Law (30-A M.R.S.A. § 4403), the Junkyard and Automobile Graveyards Law (30-A M.R.S.A. § 3754), and the statute governing zoning ordinance amendments (30-A M.R.S.A. § 4352) are examples. Title 1, § 601 provides that such hearing notices must, at a minimum, be published in newspapers meeting the following requirements, unless ordered otherwise by a court:

- * The newspaper must be printed in English language;
- * It must be entered as second class postal matter in the United States mail at a post office; and
- * It must have general circulation in the vicinity where the notice is to be published.

Any legal notice, legal advertising or other matter required by law to be published in a newspaper must appear in all editions of the newspaper.

Section 601 currently requires that the newspaper be published and printed in this State ant that it be mailed at a post office in this State. This will no longer be required after September 18, 1997.

(By R.W.S.)

Notice of Requirements for Public Proceedings

This is part of the Legal Packet: Ordinance Enactment. Note: This packet is intended for general information only. For additional information or specific legal advice, contact local council or MMA's Legal Services.

This legal note outlines notice requirements for various types of public proceedings. Before discussing these requirements, however, it is helpful to review some commonly used terms.

The terms, "public meeting" and "public hearing," are often used but have no clear legal distinction or definition. The general rule of thumb is that members of the public may attend public meetings (selectmen's meetings, planning board meetings, etc.) but have no absolute right to speak, at a public hearing, however, the public does have a right to speak because that is the purpose of the hearing. Note that a local charter or ordinance may define "public meeting" or "public hearing," and in that event those definitions should be consulted in conjunction with any notice provisions in the charter or in local ordinances to determine what notice is required by local law.

Public meetings and public hearings are both "public proceeding" as defined in 1 M.R.S.A. § 402 (part of the Right-to-Know Law). The public must be notified of such proceedings pursuant to 1 M.R.S.A. § 406. Issues other than notice and hearings are not discussed here. For further information, see the April 1976 MAINE TOWNSMAN article entitled "How to Conduct a Public Hearing."

The General Rule

1 M.R.S.A. § 406 requires public notice for a "meeting of a body or agency consisting of 3 or more persons." The statute does not require a particular form or medium of notice, but sets a general standard:

"This notice shall be given in ample time to allow public attendance and shall be disseminated in a manner reasonably calculated to notify the general public in the jurisdiction sewed by the body or agency concerned. In the event of an emergency meeting, local representatives of the media shall be notified of the meeting, whenever practical, the notification to include time and location, by the same or faster means used to notify the members of the agency conducting the public proceeding" (emphasis added).

The body responsible for calling the meeting can determine what manner of notice is best. Circumstances to consider include: cost and availability of radio, television or print media, amount of time available, and past notification practices. However, the municipal officers or the voters may prefer to establish a uniform method for giving notice.

In some municipalities, the best method might be to simply post a notice at the town hall, town dump, local coffee shop, and any other place where members of the public are likely to see it. In other municipalities, the daily paper or local radio station might be the best way to reach the public.

The foregoing general rule is exactly that; a rule to use when there is o statute or local ordinance or regulation which sets more specific notice requirements. Any local rule must meet the requirement of 1 M.R.S.A. § 406 that the notice be reasonably calculated to notify the public.

Specific Requirements

The following list is a compilation of state laws which require particular time frames or forms of notice for public proceedings. This list is not all-inclusive, but does cite some commonly encountered laws. The laws are listed alphabetically by subject matter, with a brief description of the notice requirements. This is not intended to be used as a substitute for reading the full text of the statute. All time periods stated (e.g., "7 days") are minimums.

Charter Commission. 30-A M.R.S.A. § 2103 (2): 7 days' notice of organizational meeting. 30-A M.R.S.A. § 2103 (5): 10 days' notice of public meeting, newspaper publication required. 30-A M.R.S.A. § 2104(5): amendments to charter require 7 days' notice, newspaper publication.

Comprehensive Plan. 30-A M.R.S.A. § 4324(8): public hearing for proposed plan requires 30 days' notice, newspaper publication.

Ordinances. 30-A M.R.S.A § 3002 requires 7 das' notice by posting for enactment or revision by the legislative body of a municipality.

Ordinances. For ordinances that can be enacted by Municipal Officers (i.e., Selectmen or Council): 30-A M.R.S.A. § 3008 (cable T.V.) requires 7 days' posted notice of meeting. 30-A M.R.S.A. § 3009 (traffic regulation) required 7 days' posted notice of meeting. Although not specifically required by statute, a 7-day notice should also be given before adopting General Assistance Ordinances.

Referendum Question. For towns which have adopted a referendum, 30-A M.R.S.A. § 2528, 30-A M.R.S.A. § 2528(5) requires at least 7 days' notice of public hearing on the subject of the referendum. The hearing must be at least 10 days before the vote.

Subdivision Regulations. Where no local subdivision ordinance has been adopted, 30-A M.R.S.A. § 4403(2) requires 7 days' notice of hearing to adopt, amend or repeal regulations. 30-A M.R.S.A. § 4403(4) requires 7 days' notice by newspaper publication of any public hearing to approve subdivision application.

Town Meetings. For annual and special town meetings, 30-A M.R.S.A. § 2523 requires at least 7 days' notice by posting warrant in one or more conspicuous, public places in town.

Zoning. For a rezoning by either conditional or contract zoning, 30-A M.R.S.A. § 4352(8) requires public hearing, two notices by newspaper publication (the first of which must appear at least 7 days before the hearing), and posting of notice in the municipal office at least 14 days before the hearing. Notice to abutters is also required (Note: Posting in municipal office now required 13 days prior)

In addition to the foregoing, public hearings or meetings are required for such municipal activities as the issuance of licenses and permits. These include automobile graveyard permits, victualer's licenses, special amusement licenses, and the like. For further information on the specific requirements of these activities, see the MMA Licensing/Permitting Manual (1989).

In conclusion, a three-step process is recommended when you are unsure of the type or method of notice required for a public proceeding. First, read your local ordinance or charter for guidance; second, check the state statures or particular requirements; finally (if you find nothing specific to guide you), follow the general rule outlined in 1 M.R.S.A. § 406. Bear in mind, however that no local provision can undercut or relax the Maine Right to Know Law's requirements that notice be given of every meeting of a municipal body which consists of three or more members, and that "3 or more" refers to the total number of members of the body, not just the number expected to appear at any particular meeting. (B J.J.W./E.P.C)

AMENDMENT OF ZONING ORDINANCE NOTICE REQUIREMENTS

Many municipalities may still be unaware of the notice requirements found in 30-A M.R.S.A. § 4352 (C)(9) and (10) relating to the adoption of a new zoning ordinance or the amendment of an existing zoning ordinance. Those who were aware of the existing requirements should know that some of the deadlines were changed effective March 28, 1997.

If your community is going to adopt a new zoning ordinance or maps or amend an existing one, the planning board (or municipal officers, if there is none) must conduct a public hearing on the proposal. The hearing must be preceded by public notice which is

- 1) posted at the municipal office at least 13 days before the hearing and
- 2) published at least 2 times in a newspaper of general circulation in the municipality which complies with 1 M.R.S.A. § 601 (see related Legal Note regarding newspaper notice).

The date of the first publication must be at least 12 days before the hearing and the date of the second publication must be at least 7 days before the hearing. The notice must be written in "plain English, understandable by the average citizen." These requirements for notice apply even to ordinances being adopted or amended under the Mandatory Shoreland Zoning Act and the Growth Management Act.

In addition to the information described above, the published and posted notice must contain a copy of a map indicating the portion of the municipality affected by the proposed amendment in certain cases. The map is required if the amendment will have the effect of either prohibiting all industrial, commercial or retail uses where any of these uses is permitted currently or permitting any industrial, commercial or retail uses where any of these uses is currently prohibited.

If a municipality is amending an existing zoning ordinance or map which does not involve shoreland zoning or a zoning ordinance adopted under the Growth Management Act, there are additional notice requirements which may come into play. If the proposed amendment affects only certain geographic areas of the municipality and has the effect of either prohibiting all industrial, commercial or retail uses in a geographic area where any of theses uses is currently permitted or if it would permit an industrial, commercial, or retail use where such a use is currently prohibited, certain notice to individual landowners is required:

- 1) the notice must contain a copy of a map indicating the portion of the municipality affected by the proposed amendments and
- 2) the notice must be mailed to the owners of each parcel in or abutting the area affected by the proposed amendment by first class mail at least 13 days before the hearing.

Notice must be sent by first class mail to the last known address of the person to whom the property was assessed. The municipal officers must prepare and file with the municipal clerk a written certificate indicating the name and address of persons to whom notice was mailed, the date and location of the mailing, and the person who actually mailed it.

Municipalities are reminded that all of the notice requirements required by section 4352 also apply to the adoption or amendment of floodplain development ordinances, since they fit the definition of "zoning" in 30-A M.R.S.A. § 4301.

If a municipality is proposing to place land in a resource protection zone under its shoreland zoning ordinance, 38 M.R.S.A. § 438-A (1-B) requires the municipality to give written notice to the landowners whose land is being considered for such placement. Notice must be by first-class mail to the last known addresses of the persons against whom property tax on each parcel is assessed. The municipal officers must prepare and file with the clerk a sworn, notarized certificate indicating the people to whom notice was mailed, at what address, when, by whom, and from what location notice was mailed. Notice must be sent not later than 14 days before the planning board votes to set a public hearing date for the board's hearing on a proposed ordinance or amendment which will place land in resource protection. This notice is not required if an amendment which does not propose to include land in resource protection. The notice required by 38 M.R.S.A. § 438-A (1-B) is in addition to the notice required under 30-A M.R.S.A. § 4352 (9) described above.

(by R.W.S)

An Ordinance Amending the Kennebunkport Land Use Ordinance February 4, 1994 Draft for Public Hearing

Additions are underlined; deletions are crossed out.

Part 1. Amend Section 1.3 as follows:

Under the authority of the Title 30 M.R.S.A., Section 1917 and 4962 Title 30-A M.R.S.A., Sections 2691, 3001, 4352, 4358 and Title 38 M.R.S.A., section s435-449, any other enabling statutes, and all amendments thereto, the Town of Kennebunkport hereby regulates pursuant to this Ordinance the inspection, materials, construction, demolition, alteration, repair, height, bulk area, ground coverage, location and use of buildings and structures, and the use of land, throughout the Town; and also hereby divides the Town into zones.

Part 2. Within Section 2.2, add, amend or delete the following definitions:

Aquatic lands: Tidal or sub tidal lands located below the normal high water mark of coastal waters.

Body of Water: The phrase "body of water" includes the following:

- a. Tidal water A body of water which is subject to tidal action, including the Kennebec River.
- b. Pond An inland impoundment of water, natural or manmade, which collects and stores surface water.
- e. River A free flowing body of water including its associated flood plain wetlands from that point at which it provides drainage for a water shed of 25 square miles to its mouth.
- d. Stream A free flowing body of water from the outlet of a great pond or the point of confluence of two perennial streams as depicted on the most recent edition of a United States Geological Survey 7.5 minute series topographic map, or if not available, a 15 minute series topographic map, to the point where the body of water becomes a river or flows to another waterbody body of water or wetland within the Shoreland area zone.
- e. Great Pond Any inland body of water which in a natural state has a surface area in excess of 10 acres and any inland body of water artificially formed or increased which has a surface area in excess of 30 acres except, for purposes of this Ordinance, where the artificially formed or increased inland body of water is completely surrounded by land held by a single owner. This term includes Beaver Pond.
- f. Tributary stream a channel between defined banks created by the action of surface water, whether intermittent or perennial, and which is characterized by the lack of upland vegetation or presence of aquatic vegetation and by the presence of a bed devoid of topsoil containing waterborne deposits on exposed soil, parent material or bedrock, and which flows to a water body body of water or wetland as defined. This definition does not include the term "stream" as defined elsewhere in this Ordinance, and only applies to that portion of the tributary stream located within the Shoreland zone of the receiving water body body of water or wetland.

100 Year Flood Plain: That area with a 1% chance of flooding in any given year, as depicted as the special flood hazard area on the Flood Insurance Rate Map for the Town of Kennebunkport, prepared by the Federal Emergency Management Agency and dated July 4, 1988.

Recent Flood Plain Soils in the Town of Kennebunkport. The recent floodplain soil is Rumney loam as described and identified by the National Cooperative Soil Survey of the United States Department of Agriculture (U.S.D.A.).

Salt marsh—Areas along coastal waters (most often along coastal bays) which support salt tolerant species, and where at average high tide during the growing season, the soil is regularly inundated by tidal waters. The predominant species is salt marsh cordgrass (Spartina alterniflora). More open areas often support widgeon grass, eelgrass and Sage pondweed.

Salt meadow—Areas which support salt tolerant plant species bordering the landward side of salt marshes or open coastal water, where the soil is saturated during the growing season but which is rarely inundated by tidal water. Indigenous plant species include salt meadow cordgrass (Spartina patens) and black rush; common threesquare occurs in fresher areas.

C-3

Ordinance Certification

(for use as evidence in court)

I,	, the duly appointed Town Clerk
for the Town of	, hereby certify pursuant to
30-A M.R.S.A. § 3006 that the attac	hed are true and accurate copies of the
	of the Town of and
that portion of the Zoning Map show	vn outlined in yellow as relates to
	property on
	road in
	has/have been in effect
without change from	to the date hereto, except as
amended on	as shown.
Dotod	
Dated:	
	Town Clerk
(Note: This is a form for certifying	a zoning ordinance and portion of the zoning map for use as
evidence in court.)	

Adoption of Codes by Reference

Title 30-A, section 3303 establishes certain legal requirements with which a municipality must comply if it wants to adopt a code by reference or incorporate certain standards by reference into an existing ordinance. In order for such a code or standards to be enforceable, it is very important to comply with the provisions of this law. For further information see Chapter 4 of this manual.

Title 30-A § 3003. Adoption of codes by reference

- **1. Definitions.** As used in this section, unless the context otherwise indicates, the following terms have the following meanings.
- A. "Code" means any published compilation of regulations or enforceable standards which has been prepared by any association or organization that is nationally recognized for establishing standards in the areas set out below, or any department or agency of the Federal Government or the State, and includes:
 - (1) Building codes;
 - (2) Plumbing codes;
 - (3) Electrical wiring codes;
 - (4) Health or sanitation codes;
 - (5) Fire prevention codes;
 - (6) Inflammable liquids codes; and
 - (7) Any other code which embraces regulations pertinent to a subject which is a proper municipal legislative matter.
 - B. "Published" means printed or otherwise reproduced.
- **2.** Adoption and amendment of codes by reference. Any ordinance adopted or repealed by a municipality under its home rule authority may incorporate by reference any code or portions of any code, or any amendment of such a code, properly identified as to date and source, without setting forth the provisions of the code in full.
 - A. At least one copy of the code, portion or amendment that is incorporated or adopted by reference must be filed in the office of the municipal clerk and kept there available for public use, inspection and examination. The required copy of the codes, portion or amendment or public record must be filed with the municipal clerk for 30 days before the adoption of the ordinance that incorporates the code, portion or amendment by reference.
 - B. If such a code, portion or amendment is promulgated by a metropolitan or regional agency, the adopting municipality must be within the territorial boundaries of the agency.
 - C. The filing requirements for ordinances adopted under Title 38, sections 435 to 447, are deemed to be met if the codes were on file in the clerk's office by July 1, 1974.
- **3. Posting and publication of adopting ordinance.** This section does not relieve any municipality of the requirement of posting or publishing in full the ordinance which adopts a code, portion or amendment by reference. All provisions applicable to that publication shall be fully and completely carried out as if no code, portion or amendment were incorporated in the ordinance.
- **4. Adoption of penalty clauses.** Any ordinance adopting a code, portion or amendment by reference shall state the penalty for violating the code, portion or amendment separately. No part of any such penalty may be incorporated by reference.

Adoption of Code By Reference Sample Bar Harbor Building Ordinance

CHAPTER 4 BUILDING

SECTION 04.01 BUILDING CODE

04.01.01 BOCA National Building Code Adopted

The 1993 Edition of the BOCA National Building Code as recommended and published by the Building Officials and Code Administrators International, Inc., is adopted by this reference and made a part of this chapter with the same force and effect as though set out in full herein, as the Official Building Code of the Town of Bar Harbor, subject to the additions and deletions set forth in this article.

Amended 01/17/95

04.01.02 Copies on File With Clerk

Pursuant to Title 30-A M.R.S.A. § 3303 at least three (3) copies of the BOCA National Building Code as adopted by reference by Section 04.01.01 above, have been and shall be on file in the office of the Town Clerk for public inspection and use.

04.01.03 Additions to and Deletions from BOCA National Building Code

04.01.03.01 Additions

The following are hereby added to the BOCA National Building Code adopted by reference as the Building Code for the Town of Bar Harbor in Section 04.01.01 above:

- Section 101.1 by inserting "the Town of Bar Harbor".
- Section 3408.2 by inserting "1986".
- Section 107.6 by replacing that portion that reads "private sewage disposal code listed in Chapter 35 shall be submitted with the site plan" with "State of Maine Department of Human Services shall be submitted with the site plan on form HHE-200".
- Section 112.3.1 by inserting "Fees shall be set by the Town Council from time to time".
- Section 117.2 by replacing "of not less than (amount) or not more than (amount)" with "in an amount authorized by 30-A M.R.S.A. § 4452".
- Section 201.3 by adding "Where terms defined in this code or in the plumbing, fire prevention or mechanical codes listed in Chapter 35 conflict with any of the terms defined in the Bar Harbor Code, the definitions contained the Bar Harbor Code shall control".

Amended 10/06/92, 01/17/95

04.04.04.02 Deletions

The following sections or portions thereof are hereby deleted from the BOCA National Building Code adopted by reference as the Building Code of the Town of Bar Harbor in Section 04.01.01 above:

- Section 104.1
- Section 104.4
- Section 105.6
- Section 105.8
- Section 107.1, item 6 only
- Section 107.9
- Section 108.9
- Sections 112.4 through and including 112.5
- Sections 116.3 through and including 116.4
- Section 118.4
- Section 119.5
- Sections 121.0 through and including 121.7
- Sections 1001.0 through and including 1028.2
- Sections 1101.0 through and including 1110.4
- Sections 1301.1 through and including 1308.1
- Sections 2901.0 through and including 2908.3.3
- Sections 3101.0 through and including 3102.14.1
- Sections 3201.0 through and including 3205.4
- Chapter 35 Referenced Standards Standard reference number BNPC-1993 BOCA National Plumbing Code
- Chapter 35 Referenced Standards Standard reference number BNPSDC- 1993 BOCA National Private Sewage Disposal Code

Amended 10/06/92, 01/17/95

04.01.04 Enforcement

This chapter shall be enforced pursuant to the provisions of 30-A M.R.S.A. § 4452 (5452) Rule 80K of the Maine Rules of Civil Procedure and Section 15.10 of this Code by any municipal official authorized by law to do so.

Amended 10/06/92, 01/17/95

Maine Municipal Association, Maine Townsman By Gary Wood, Esq., 1988

Municipalities May Give Ordinances A Retroactive Effect

Please Note: Despite this article's original publication date, it remains a valid resource on the relevant subject matter. Recent cases and statutory changes are footnoted to reflect current law. (8/98)

In the case of *City of Portland et al v. Fishermen's Wharf Associates II*, Maine Supreme Judicial Court Decision #4746 (decided April 27, 1988) [This case is found in the Atlantic Reporter at 541 A.2d 160 (Me. 1988)], the Maine Supreme Court held that a municipal ordinance may contain a legally binding provision making the ordinance effective on the date that it is proposed rather tan on the date that it is enacted. In reaching this ruling, the Court also held that such a provision in an ordinance overrides the statutory rule of prospective application of ordinances and statutes found in 1 M.R.S.A. § 302.

The facts of this case were that citizens initiated a proposed ordinance, pursuant to Portland's municipal charter, by filing that proposed ordinance with the municipal clerk on December 22, 1986. The ordinance specifically stated that it would apply to any applications commenced after that date if the ordinance was ultimately enacted by a vote of the city's legislative body. After that date, but before the enactment of the ordinance, the owners of Fisherman's Wharf filed an application for a permit to develop property within the zone that was the focus of the proposed ordinance: The owners of the property knew of the contents of the proposed initiated ordinance and its retroactive provision prior to the time that they acquired title to the property. In late April of 1987, the local planning board determined that the applicants were entitled to the permits that they sought under the then existing ordinances. One week later the municipality voted to pass the proposed ordinance under whose terms the proposed project would not be permitted.

The Court also ruled that the time and money spent by the applicants to obtain the permits required under the old ordinance were not expenditures that created any vested rights in the applicants. Finally, the Court concluded that, given the applicants' knowledge of the contents of the proposed ordinance, including its retroactive provision prior to acquiring title to the property in question and the lack of any evidence of bad faith or discriminatory treatment by the city or ordinance proponents, that the applicants had failed to demonstrate any vested rights based on equitable grounds.

The primary advantage of this ruling to municipalities is that it will allow them to propose ordinances and at the same time bar a last minute rush to the door by applicants who are trying to beat the restrictions contained in the proposed ordinance. If the municipal officers or planning board or citizens initiate a proposed ordinance that will ultimately have to be enacted by the municipality's legislative body, the ordinance should contain a provision making it effective on the date that it is proposed which should also be specifically identified in the ordinance. The proposed ordinances should be filed with the town clerk at the town office as well as posted in town. Its existence should also be noted in one or more newspapers with general circulation in the municipality in order to notify as many individuals as possible of the potential change in town law. To minimize any potential claims of vested rights based on equitable grounds, the municipality should send personal notice by mail to individuals or entities that purchase property in the municipality. The municipal offers should then take whatever steps are necessary to bring the ordinance promptly before the voters, which in many municipalities will mean calling a special town meeting.

Municipalities should not use the fact that a time gap can legally exist between the effective date and the date of enactment as a disguised mechanism for slowing growth. Nor, as a general rule, should municipalities react to specific proposals by enacting ordinances aimed precisely at those proposals. Municipalities should continue to plan for future growth and development rather than simply react to growth and development on an ad hoc basis.

NOTE: The provision at issue in this case read as follows: "(If enacted, the provisions of this ordinance) shall be applicable to all pending proceedings, applications and petitions commenced after December 22, 1986, which is the date of filing this initiative in the City Clerk's office of the City of Portland."

"The 2003 Ordinance Deadline" What does it mean and how does it affect you?

The State Planning Office (SPO) Land Use Team and Regional Councils have been fielding calls from concerned citizens, planners, and local officials regarding the upcoming legislative deadline that affects zoning, rate of growth, and impact fee ordinances. Some <u>commonly asked questions</u> (with responses) below should help clarify our interpretation of the law.

While this document has been developed to assist our constituents in understanding the law and its basic interpretation, members of the SPO Land Use Team are not attorneys. If you have a specific question about the legal interpretation of this law or the impact of this law in your town, we suggest you consult a land use attorney directly. It is up to each town to gauge the risk of challenge it faces under this statute and choose a course of action; a land use attorney can assist you in that decision-making process. If you have *general* questions or concerns about the law that are not addressed here, please contact SPO or your Regional Council.

Overview

A municipality is subject to the law concerning the 2003 deadline (<u>30-A MRSA</u>, <u>section 4314(3)</u>) if it has the following types of ordinances:

- zoning (other than mandatory shoreland zoning);
- rate of growth (also know as a building cap or growth cap); or
- impact fee.

The law says that all or portions of these ordinances are subject to being declared invalid by a court after January 1, 2003 (or later if one of three extensions apply) unless the court finds that:

the municipality has a "comprehensive plan adopted under the subchapter", and the challenged ordinance (or portion thereof) is consistent with the plan.

A municipality that has the types of ordinances subject to this law should seek the advice of its attorney regarding the likelihood that all or portions of the ordinances would be declared invalid under 30-A MRSA section 4314(3) if challenged in court.

Frequently Asked Questions

- 1. What is the law in question?
- 2. To which types of ordinances does the law apply?
- 3. Under what circumstances will my town's ordinances continue to be valid?
- 4. What do you mean, "a comprehensive plan adopted under this subchapter?"
- 5. If my town does not have a plan that SPO has found consistent, will the local zoning, rate of growth, and impact fee ordinances be voided on January 1, 2003?
- 6. My town's plan was found inconsistent by SPO after we adopted a zoning ordinance. What happens now?
- 7. I don't know if my ordinances are "consistent." What does that mean?
- 8. If the ordinance in question is not consistent with a consistent plan, is the whole ordinance thrown out?
- 9. My town doesn't have zoning (other than mandatory shoreland zoning), rate of growth, or impact fees ordinances does the January 1, 2003 deadline affect my town's other ordinances?
- 10. Are there any extensions to the January 1, 2003 deadline?
- 11. What is the best course of action if my town attorney believes that my town's zoning (other than mandatory shoreland zoning), rate of growth or impact fee ordinances are in danger of being declared invalid by a court, either because my town's comprehensive plan is inconsistent with the Act or because the ordinances are inconsistent with my town's consistent plan?

Summary

1. What is the law in question?

Title 30-A, §4314(3) reads:

"Rate of growth, zoning and impact fee ordinances. After January 1, 2003, any portion of a municipality's rate of growth, zoning or impact fee ordinance must be consistent with a comprehensive plan adopted under this subchapter. The portion of a rate of growth, zoning or impact fee ordinance that is not consistent with a comprehensive plan is no longer in effect unless:

<A. and B. were repealed>

- C. The ordinance or portion of the ordinance is exempted under <u>subsection 2</u> (mandatory shoreland zoning ordinances);
- D. The municipality is under contract with the office to prepare a comprehensive plan or implementation program, in which case the ordinance or portion of the ordinance remains valid for up to 4 years after receipt of the first installment of its first planning assistance grant or for up to 2 years after receipt of the first installment of its first implementation assistance grant, whichever is earlier;
- E. The ordinance or portion of the ordinance conflicts with a newly adopted comprehensive plan or plan amendment adopted under this subchapter, in which case the ordinance or portion of the ordinance remains in effect for a period of up to 24 months immediately following adoption of the comprehensive plan or plan amendment; or
- F. The municipality applied for and was denied financial assistance for its first planning assistance or implementation assistance grant under this subchapter due to lack of state funds on or before January 1, 2003. If the office subsequently offers the municipality its first planning assistance or implementation assistance grant, the municipality has up to one year to contract with the office to prepare a comprehensive plan or implementation program in which case the municipality's ordinances will be subject to paragraph D."

2. To which types of ordinances does the law apply?

The law only applies to rate of growth, impact fee, and zoning ordinances. A Rate of Growth ordinance, also known as a building cap or growth cap, is defined in state statute as a land use ordinance or other rule that limits the number of building or development permits issued by a municipality or other jurisdiction over a designated time frame. An Impact Fee ordinance establishes the applicability, formula and means by which impact fees are assessed locally. Zoning ordinances are defined in law as a type of land use ordinance that divides a municipality into districts and that prescribes and reasonably applies different regulations in each district. All zoning ordinances are subject to the law except for mandatory shoreland zoning ordinances that do not go beyond the state minimum guidelines. The 2003 deadline does not affect other local ordinances. (See also question 9)

3. Under what circumstances will my town's ordinances continue to be valid?

Local ordinances continue to be valid if the town has a "comprehensive plan adopted under the subchapter" and the challenged ordinance (or portion thereof) is consistent with the plan. Both requirements must be met. (See also questions $\underline{4}$ and $\underline{7}$)

4. What do you mean, "a comprehensive plan adopted under this subchapter?"

The subchapter referred to in the law is the <u>Planning and Land Use Regulation Act</u> ("Act"). "Adopted under this subchapter" is interpreted by SPO to be a comprehensive plan that is consistent with the Act in that it has been created and adopted using the process described in the Act, and includes the required elements and addresses the goals and policies described in the Act. (See also the <u>Comprehensive Plan Review Criteria Rule</u> (Chapter 202).)

SPO uses the terms "comprehensive plan adopted under this subchapter" and "consistent comprehensive plan" interchangeably. SPO will review a plan for consistency with the Act, upon request of the town. These findings usually take two months once the comprehensive plan has been submitted and deemed complete for review. While it is likely that a judge will defer to a finding of consistency or inconsistency by SPO, in the end, it will be a judge's decision about whether or not a town's comprehensive plan is consistent with the Act. (See also questions 5, 6, 7, and 11)

5. If my town does not have a plan that SPO has found consistent, will the local zoning, rate of growth, and impact fee ordinances be voided on January 1, 2003?

No. As a practical matter, all local ordinances will remain in effect until challenged and ruled on by a judge. Only a judge can decide if this law affects your ordinances. Before this happens, a party with "standing" (for example an upset abutter or denied developer) would have to bring suit against the town. If a town does not have a comprehensive plan that has been found consistent with the Act by SPO, the judge may conduct his/her own evaluation of the town's comprehensive plan for consistency with the Act and may find that the challenged zoning, rate of growth, and/or impact fee ordinances do not meet the requirements of the Act and are no longer in effect.

If this is a concern for you, we recommend that your town should gauge its risk of being challenged in court and consult an attorney or the Maine Municipal Association's Legal Services branch (if the town is a member). Consistency reviews by the State Planning Office take at least two months *after* the plan has been deemed complete for review. Note that the SPO finding is not the only way a comprehensive plan could be found consistent. Remember, a judge may find that your comprehensive plan, even without a consistency finding by SPO, has been "adopted under this subchapter" for purposes of this statute. (See also questions 4, 6, and 11)

6. My town's plan was found inconsistent by SPO after we adopted a zoning ordinance. What happens now?

When your plan was found inconsistent, SPO outlined the areas of inconsistency and recommendations for addressing them. We strongly recommend you work toward updating your plan to address that consistency finding. In the short-term, if SPO has found your plan inconsistent, we suggest you consult the town's attorney for an analysis of the likelihood of challenge by an unhappy developer, angry abutter, or other party that may have "standing" in a lawsuit. A judge may find that your comprehensive plan, even with an inconsistency finding by SPO, has been "adopted under this subchapter" for purposes of this statute; or the judge may rely on SPO's finding and void your zoning, rate of growth, and/or impact fee ordinances because the underlying comprehensive plan is not consistent with the Act. (See also questions 4, 5, and 11)

7. I don't know if my ordinances are "consistent." What does that mean?

A "consistent" ordinance is one that has a foundation or basis in the town's comprehensive plan (i.e., is consistent with the plan) and is not in conflict with other state or federal laws. SPO may review land use ordinances, including zoning, rate of growth, and impact fee ordinances and issue a consistency finding upon request of a town, if staff resources permit. These findings usually take two months once the ordinances have been submitted and deemed complete for review. However, state law does not designate SPO as the only party that may find an ordinance consistent. While it is likely that a judge will defer to a finding of consistency or inconsistency by SPO, in the end, it will be a judge's decision about whether or not a challenged ordinance, or a portion of an ordinance, is consistent with a town's comprehensive plan. (See also question 8)

If your town has ordinances, but no adopted comprehensive plan, by definition they are not "consistent" – since they do not have anything to be consistent with. Nevertheless, it is up to a judge to determine that an ordinance or a portion of an ordinance is "no longer in effect." (See also questions 4 and 8)

8. If the ordinance in question is not consistent with a consistent plan, is the whole ordinance thrown out?

No. First of all, as a practical matter *all* local ordinances will remain in effect until challenged and ruled on by a judge. Only those *portions* of the ordinances that may be challenged as being inconsistent with a consistent comprehensive plan are vulnerable - the remainder of the ordinance stays in effect. Only a judge can determine that an ordinance or a portion of an ordinance is "no longer in effect"- and a judge

will only address this issue if a party with standing (e.g., a party that has been directly affected by the ordinance in question, for example an upset abutter or denied developer) brings suit against the town. (See also questions 4, 7, and 11)

9. My town doesn't have zoning (other than mandatory shoreland zoning), rate of growth, or impact fees ordinances - does the January 1, 2003 deadline affect my town's other ordinances?

The law only affects zoning, rate of growth, and impact fee ordinances. *However*, your town may have ordinances in place that, while not called "zoning" ordinances, meet the state's definition of a zoning ordinance. Ordinances such as historic preservation districts that clearly include a mapped district are likely to be interpreted by a judge as being a zoning ordinance. Other ordinances that may be interpreted as zoning ordinances by a judge include (but are not limited to) wetlands ordinances, which regulate certain areas based on their physical characteristics, or telecommunications tower ordinances, which limit the location of towers based on attributes of the land. Shoreland zoning ordinances that do not go beyond the state minimum guidelines are not at risk from this law; they do not need to be consistent with a comprehensive plan. However, if the town's shoreland zoning ordinance has gone beyond the state minimums, those portions that go beyond the state's model must be consistent with a consistent comprehensive plan. Consult a land use attorney to discuss the relative risk faced by these other types of zoning ordinances. (See also questions 7, 8, and 11)

10. Are there any extensions to the January 1, 2003 deadline?

Yes. There are three possible extensions of the January 1, 2003 deadline for towns meeting certain conditions:

- 1. If a municipality is under contract with the State Planning Office to prepare a comprehensive plan or implementation program, the deadline is extended for up to four years after receipt of the first installment of its first planning assistance grant or for up to two years after receiving its first installment of its first implementation assistance grant, whichever is earlier. (Note: for towns undertaking a comprehensive plan update, current ordinances must be consistent with your existing comprehensive plan until you adopt that updated plan, after which provision #2 below holds);
- 2. If the municipality has a newly adopted consistent plan or amendment, the deadline is extended for up to 24 months following adoption of the comprehensive plan or amendment.
- 3. If the municipality applied for and was denied financial assistance for its first planning or implementation grant due to lack of state funds on or before January 1, 2003, the deadline is extended indefinitely until the municipality is offerred and rejects or receives a grant, at which point it becomes subject to the deadline described in #1 above.
- 11. What is the best course of action if my town attorney believes that my town's zoning (other than mandatory shoreland zoning), rate of growth or impact fee ordinances are in danger of being declared invalid by a court, either because my town's comprehensive plan is inconsistent with the Act or because the ordinances are inconsistent with my town's consistent plan?

If a municipality has the types of ordinances subject to this law, and knows it does not have a consistent comprehensive plan, it should immediately begin efforts to create a comprehensive plan or update the existing plan.

If a municipality does not have a comprehensive plan that has been reviewed by SPO, it should consult with its regional council or SPO regarding the requirements for consistency and consider submitting its comprehensive plan to SPO for a consistency finding. If specific portions of the plan are found to be inconsistent by SPO, the plan should be amended to achieve consistency and obtain a follow-up affirmative SPO finding.

A municipality that has obtained an SPO finding of consistency for its comprehensive plan should take the next step of submitting its zoning, rate of growth and impact fee ordinances (if applicable) to SPO for a consistency finding. If specific portions of the ordinances are found to be inconsistent by SPO, the ordinances should be amended to achieve consistency and a follow-up affirmative SPO finding obtained.

Summary

The law can be applied to zoning (except mandatory shoreland zoning), rate of growth, or impact ordinances in two ways:

<u>SCENARIO 1:</u> If a municipality does not have a consistent comprehensive plan, <u>all</u> such ordinances are subject to being declared invalid by a court after the applicable deadline (January 1, 2003 or later if an extension applies).

A municipality clearly does not have a consistent comprehensive plan if:

- it has no plan;
- the plan was adopted prior to the Comprehensive Planning and Land Use Regulation Act (1989); or a court has declared the plan inconsistent.

A municipality clearly has a consistent plan if it has been declared consistent by a court.

A good argument can be made that a plan is consistent or inconsistent if SPO has reviewed and made a finding. An SPO finding is not conclusive, but we believe that a court will tend to defer to SPO's finding.

It is unknown what a court would do if it finds a plan partially consistent and the challenged ordinance is consistent with a consistent portion of the plan.

<u>SCENARIO 2:</u> If a municipality has a consistent comprehensive plan, any <u>portion</u> of an ordinance that is inconsistent with the plan is subject to being declared invalid by a court after the applicable deadline (January 1, 2003 or later if an extension applies).

A municipality clearly has an inconsistent ordinance (or portion thereof) if it has been declared inconsistent with the municipality's consistent comprehensive plan by a court.

A good argument can be made that the ordinance (or portion thereof) is consistent or inconsistent if SPO has reviewed it and made a finding. An SPO finding is not conclusive, but we believe that a court will tend to defer to SPO's finding.